

STATE OF MICHIGAN
COURT OF APPEALS

HORST EHRLER and KAREN GODLEWSKI,

Plaintiffs-Appellants,

v

FRANKENMUTH MOTEL, INC.,

Defendant-Appellee.

UNPUBLISHED

August 2, 2011

No. 296908

Saginaw Circuit Court

LC No. 09-005138-NO

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

DONOFRIO, P.J., *dissenting*.

I respectfully dissent. The facts of this case are clear. During the early morning of January 4, 2009, a morning rainy mist froze on the parking lot of defendant's motor courtyard motel. The plaintiffs each fell on the parking lot due to the ice condition and claim injuries. The parties agree and the majority accepts that the icy parking lot presented a condition that was open and obvious. The majority concludes that the open and obvious icy condition of the parking lot constituted a special aspect because it was effectively unavoidable and reverses the trial court's grant of summary disposition in favor of defendant and the denial of reconsideration. The trial court concluded as does this Court that the icy condition as presented was open and obvious, and determined that although the icy condition existed, "[t]his is not a case where the risk was unavoidable" and, denied reconsideration. In my view, because plaintiffs did not create a justiciable question of fact that the icy condition that existed was unavoidable, the condition did not constitute a special aspect within the meaning of *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). Therefore, I would affirm the trial court's grant of summary disposition. MCR 2.116(C)(10).

Plaintiffs, on reconsideration, sought a determination from the trial court that the salting the trial court found and the denial of special aspects were questions of fact. The majority concludes, "[w]e hold that there was a special aspect to the icy conditions in this case. Plaintiffs had to encounter the icy conditions present at the motel that morning if they desired to leave their room and go to the front office for the complimentary continental breakfast or for any other reason." But the majority fails to consider plaintiffs' own behaviors in the context of their ability to avoid the icy conditions and thereby negate the special aspects exception to the general rule of nonliability for dangerous conditions that are open and obvious. The *Lugo* Court concluded:

[W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there

are truly “special aspects” of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the “special aspect” of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo*, 464 Mich at 517-518.]

The trial court here explained that, “[t]he risk was avoidable by simply deciding not to partake of breakfast or by having breakfast at an establishment where the conditions were safer. The same is true of Mr. Ehrler. Instead of remaining in his car where he was safe he decided to exit his vehicle, slipping on ice that he knew was present.” Indeed, at the time of Ehrler’s fall, plaintiff Godlewski was being attended to by EMS personnel with respect to her fall. It was Ehrler’s own choice to encounter the icy condition when he affirmatively decided to step out of his vehicle although his assistance was not needed at the scene. As the majority notes, Ehrler “decided to take the car across the parking lot because he did not feel safe walking.” If plaintiffs can disregard their knowledge of a dangerous condition of ice in winter in a parking lot, and voluntarily move from a position of safety to a position of harm under the guise of special aspects, as plaintiffs did here, the special aspects exception to the general rule of nonliability in situations where the dangerous condition is open and obvious eclipses the general rule.

Defendant presented deposition evidence that their clerk attempted to diminish the risk of falling on ice by salting the entry way to the front office, by salting the walkways outside the occupied courtyard rooms, and by salting the areas between parked cars. No evidence was presented that the immediate area adjacent to plaintiffs’ room or parked automobile was slippery. The parking lot itself was not salted because the clerk mistakenly thought that the general parking surface deicing had been contracted out. The clerk believed that her efforts would be effective to assist patrons who decided to leave their rooms and go to the front office by driving rather than walking across the ice covered parking lot. Plaintiffs state that a question of fact was created by Godlewski’s failure to remember if she saw any salt. The testimony by Godlewski that, “I don’t remember any salt,” or, “I don’t remember any salt at all no place,” did not create a question of fact on this point without more. No affidavits were provided to the trial court in support of plaintiffs’ opposition to defendant’s motion for summary disposition. The lack of memory does not negate the affirmative fact evidence that salt was placed. The majority concludes that when plaintiff testified, she meant no salt had been placed, but the testimony may be fairly read as meaning she has no memory either way.

Plaintiffs do not present any evidence that they looked to alternative paths of travel before crossing the icy expanse of the driving area of the parking lot. Godlewski testified that she knew of the icy conditions and that she needed to be careful as soon as she exited her room. She clearly could have returned to her room, called the office for assistance, or await a change in conditions. She stated she just took the most direct route rather than the sidewalks outside the rooms of the courtyard. She further testified that when she was less than half the distance to the front office, taking baby steps, she knew she had to be very careful. Again, she did not consider going back. She did not consider forgoing the continental breakfast. She did not consider driving to the front office although she allows that she could have driven. After crossing the

driveway and getting to the front office, she did not consider remaining there or calling her co-plaintiff to come and pick her up with the car because the icy conditions were as she stated, “atrocious.” Instead, on her way back to her room, she fell.¹

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must first “specifically identify the issues as to which [it] believes there is no genuine issue as to any material fact,” MCR 2.116(G)(4), and has the initial burden of supporting its position with affidavits, depositions, admissions, or other admissible documentary evidence, MCR 2.116(G)(3)(b); MCR 2.116(G)(6); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Once this initial burden has been met, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact for trial. *Id.* “Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Id.* In determining whether a genuine issue of material fact exists, the court must consider all documentary evidence in a light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc. (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law.” *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

The analysis begins first with the identification of a hazardous condition on the premises. Here, the icy condition of the parking lot. Next, we determine if the hazardous condition was open and obvious, here conceded. Then we determine if the hazardous condition constitutes special aspects because the condition was effectively unavoidable, here contested. While the majority would have us not look at plaintiffs’ behaviors in making the special aspects determination, it is impossible not to do so if we are to determine the critical question regarding whether there is evidence that creates a genuine issue of material fact regarding the existence of “truly special aspects.” *Lugo*, 464 Mich at 517-518. For a hazardous condition on the premises to constitute a true special aspect, it must be effectively unavoidable and as such be one in which the plaintiff has no discretion, option, or ability to avoid, but must confront the condition directly. The whole concept of “avoidability” requires an analysis of a plaintiff’s behaviors—for there is no other conduct to measure. Was the condition avoidable by the plaintiff, the party confronted? The focus of the inquiry in reviewing plaintiff’s behaviors is in the context of avoidability from an objective standpoint. It is not the manner in which the hazard was

¹ Interestingly, she exited out the front doors and down the ramp that she entered, turned right, and walked down the slope of the parking lot adjacent to the sidewalk where she fell. She did not fall going down the ramp, the same ramp that defendant stated, was salted.

approached, but the decision or lack thereof to confront the known hazard under the existing conditions and circumstances. The majority states, “[t]he *Lugo* Court provided an example of a special aspect related to the unavailability of a dangerous condition. The Court explained that if a person is trapped inside a building that only has one exit and that exit is blocked by a dangerous condition that is open and obvious (in *Lugo*, the example was a floor covered with standing water), the condition is effectively unavoidable and the open and obvious danger doctrine does not apply. *Lugo*, 464 Mich at 518. By inference, *Lugo* stands for the proposition that if the plaintiff attempts to navigate through the effectively unavoidable condition, the defendant remains liable if the plaintiff is injured in the process.” The inference is faulty in concept and when applied to the record evidence in this case. The *Lugo* Court example envisions the plaintiff being trapped. By being trapped, the *Lugo* Court envisions that the occupant is without the means and ability to reasonably avoid the condition constituting the hazard. Here, the record demonstrates that the icy condition was avoidable by simple means. Waiting, retreating, alternative routes, driving, staying in the vehicle, forgoing coffee and orange juice, and requesting assistance were all available to plaintiffs.² Here, Godlewski offers that she was interested in the potential for breakfast. That was here focus, not the open and obvious condition. Neither her statements nor her behaviors suggest any thought about avoiding the hazard. From an objective standpoint, reasonable alternatives to confronting the known hazard existed and there is nothing about the conditions or circumstances surrounding the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm. *Lugo*, 464 Mich at 517-518.

It is incumbent on plaintiffs to raise a justiciable question of fact by introducing evidence in support of their position that the icy condition constituted special aspects through unavailability. All plaintiffs presented in opposition to the motion for summary disposition was that the conditions were icy. In challenging defendant’s salt testimony, plaintiffs do not offer supporting affidavits to give meaning to the deposition testimony of Godlewski. Plaintiffs do not negate any of the alternatives that were available to them rather than taking the risks attendant to confronting an open and obvious hazard. Plaintiffs, through their own actions, cannot create a special aspect when they had obvious alternative means at hand to avoid the hazard. Respectfully, I cannot conclude on this record that plaintiffs have created a justiciable question of fact on special aspects and would, therefore, affirm the trial court’s grant of summary disposition.

/s/ Pat M. Donofrio

² This is not a situation where plaintiffs had to depart the room that they occupied. For example, there was no fire in the room that required them to exit immediately and without thought, notwithstanding the icy condition. There was no requirement that plaintiffs vacate the premises.